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In the Supreme Court of the United States

OCTOBER TERM, 1997

ARREST THE INCINERATOR REMEDIATION (A.I.R.), INC.,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9613(h), precludes federal court jurisdiction over an environmental citizen suit that challenges ongoing government cleanup actions at a CERCLA site.

2. Whether this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides federal court jurisdiction over a challenge to ongoing government cleanup actions at a CERCLA site.

3. Whether the denial of jurisdiction over challenges to ongoing government cleanup actions at a CERCLA site violates due process or any constitutional right of access to the courts.

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OPINIONS BELOW

The unanimous opinion of the en banc court of appeals (Pet. App. 1a-25a) is reported at 116 F.3d 1018. The orders of the district court (Pet. App. 26a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1997. The petition for a writ of certiorari was filed on September 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation arises from the United States Environmental Protection Agency's (EPA's) selection and implementation of remedial action addressing soil and sediment contamination at the Drake Chemical Superfund site in Lock Haven, Pennsylvania. After EPA conducted an initial emergency cleanup pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, it added the Drake site to the National Priorities List, a list of sites that pose the greatest threat to public health and the environment. Pet. App. 4a; see 42 U.S.C. 9605; 40 C.F.R. Pt. 300, App. B.

EPA's investigation revealed extensive soil contamination from industrial wastes, and that toxic contaminants had migrated into groundwater. EPA therefore concluded that the site soil must be decontaminated to protect human health and the environment. Gov't C.A. Br. 10-11. In August of 1988, EPA proposed to excavate the soil, to treat it on-site with a mobile incinerator, and to place the remediated soil back onto the site. *Id.* at 11; Pet. App. 4a. Following an opportunity for public comment, EPA in September of 1988 issued its Record of Decision, which selected on-site incineration of contaminated soils as a remedial action for the Drake site. Gov't C.A. Br. 11.[1]

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[1] Based on public comment, EPA found that the community was "pleased with the permanent destruction of the soil and sludges" and was "pleased that the site will possibly be available for some other use" upon completion of the selected remedial action. Gov't C.A. Br. 11 n.11.

A key step in EPA's implementation of an incineration remedy is the "trial burn" process, where the incinerator is operated for a limited period to generate essential data. Those data are, among other things, used to verify that the incinerator can meet required performance standards, and to evaluate the potential risks from operation of the incinerator. Pet. App. 4a. Although not required to do so by statute or regulation, EPA agreed to conduct an initial screening-level risk assessment to evaluate the potential human health risks from the trial burn itself. *Ibid.* EPA released the draft risk assessment to the public for comment in December 1995, held a public meeting and responded to written comments in January 1996, and then directed the contractor to proceed with the trial burn. *Ibid.*; Gov't C.A. Br. 12.

2. In February 1996, petitioner filed suit against EPA in an effort to bar it from conducting the trial burn and soil incineration remedy at the Drake site. Pet. App. 4a.[2] The complaint alleged that EPA's remedy violated CERCLA, the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Alleging that the trial burn would pose a hazard to human health and the environment, petitioner sought a preliminary injunction and a temporary restraining order. Pet. App. 5a; Gov't C.A. Br. 12.

EPA opposed the motion for a preliminary injunction and moved to dismiss the complaint for lack of subject matter jurisdiction. Gov't C.A. Br. 12-13. EPA agreed not to commence the trial burn at the

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[2] The Clinton County Commissioners also joined the suit. Pet. App. 4a. They, however, did not petition for certiorari.

site prior to the court's resolution of those motions. *Id.* at 13. After the district court held a hearing on the preliminary injunction motion, EPA in March of 1996 notified the district court that the agency had decided to delay the trial burn process and develop a new risk assessment to respond more fully to the concerns of petitioner and others. *Ibid.* In June of 1996, EPA issued, and filed with the district court, a five-volume, comprehensive risk-assessment report, which concluded that the trial burn process at the Drake site would not pose a threat to human health. *Ibid.*

In August of 1996, the district court dismissed the complaint, holding that CERCLA Section 113(h), 42 U.S.C. 9613(h), expressly precludes judicial review of petitioner's challenges to EPA's response actions at the site. Pet. App. 31a-36a. In particular, the court held that petitioner's RCRA and NEPA claims were barred by the Third Circuit's decision in *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (1991). Pet. App. 34a. Petitioner's claims under the CERCLA citizen suit provision, 42 U.S.C. 9659, the court held, were barred by CERCLA Section 113(h)(4). That provision, by its plain terms, allows citizen suits only *after* completion of the remedial action, the court concluded; it does not permit plaintiffs to use such suits to block EPA from implementing its remedial action in the first place. Pet. App. 33a-35a.

The district court acknowledged that its decision might not be consistent with dictum in the Third Circuit's opinion in *United States* v. *Princeton Gamma-Tech, Inc.*, 31 F.3d 138 (1994). Nonetheless, relying on the decisions of the other courts of appeals that had addressed the scope of Section 113(h) directly, the court concluded that the Third Circuit "may well

reach a different result if [or when] directly faced" with the question. Pet. App. 35a.[3]

3. After a panel of the Third Circuit urged the full court to take this case en banc to reconsider *Princeton Gamma-Tech*, the court of appeals agreed to rehear the case en banc. Pet. App. 3a. In a unanimous decision, the en banc court then affirmed the district court's dismissal of the suit for lack of subject matter jurisdiction and overruled *Princeton Gamma-Tech* in relevant part.

a. The court of appeals rejected petitioner's argument that CERCLA's citizen suit provision, 42 U.S.C. 9659, provides the district court with jurisdiction. Pet. App. 7a-16a. The court based that conclusion on CERCLA Section 113(h), 42 U.S.C. 9613(h), which states that "[n]o Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in certain enumerated proceedings]." See Pet. App. 7a-16a.

The court recognized that Section 113(h)(4) provides an exception for CERCLA citizen suits, but it held that the plain language of Section 113(h)(4) allows such suits to proceed only *after* EPA has

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[3] Following the district court's dismissal of petitioner's claims, EPA commenced the trial burn process, which was completed in February 1997. EPA is using the data generated thereby to assess the potential risks of remedial operation of the incinerator. That risk assessment will undergo an external peer review evaluation and will be released for public comment. EPA will consider the results of the risk assessment, along with all comments, prior to making its final decision on whether to proceed with remedial operation of the incinerator.

completed its remedial action. Pet. App. 10a. Not only is the statutory language unmistakeably clear, the court explained, but the legislative history is as well. *Id.* at 10a-13a. The numerous courts of appeals that have addressed the scope of Section 113(h)(4)'s exception, the court continued, have come to the same conclusion, holding that citizen suits challenging EPA remedial actions can be brought only after the remedial actions are completed. *Id.* at 14a (citing decisions of the Seventh, Eighth, Ninth and Eleventh Circuits).

b. The court of appeals similarly rejected petitioner's argument that jurisdiction could be based on the citizen suit provision of RCRA, 42 U.S.C. 6972(a)(1)(B). Pet. App. 17a-21a. CERCLA Section 113(h), the court explained, by its plain terms "preclude[s] the exercise of jurisdiction over a challenge to an ongoing CERCLA removal or remedial action under *any* federal law," including RCRA. *Id.* at 19a (citing *Boarhead*, 923 F.2d 1011).

c. The court of appeals then turned to petitioner's contention that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides a basis for jurisdiction. Pet. App. 22a-25a. Relying on this Court's decisions in *Briscoe* v. *Bell*, 432 U.S. 404 (1977), and *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), the court of appeals concluded that the *Kyne* doctrine does not apply in this case because CERCLA Section 113(h) provides clear and convincing evidence that Congress intended to deny federal court jurisdiction to review EPA's ongoing remedial actions. Pet. App. 23a-25a.

d. Finally, the court of appeals rejected petitioner's argument that the temporary preclusion of judicial review violates petitioner's constitutional

right of access to the courts. Pet. App. 16a-17a. The court concluded that the United States has sovereign immunity, and that Congress is not constitutionally obligated to waive that immunity by providing federal courts with jurisdiction to hear petitioner's claims against EPA immediately.

ARGUMENT

Section 113(h) of CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA removal and remediation actions. That Section provides in no uncertain terms that "[n]o Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under section 9604 of this title," except in certain enumerated circumstances. 42 U.S.C. 9613(h). The court of appeals below—joining every circuit that has considered the issue—properly concluded that Section 113(h) bars claims, such as petitioner's, that seek to impede EPA remedial actions providing for the cleanup of hazardous substances under CERCLA. Further review, accordingly, is not warranted.

1. Petitioner appears to contend (Pet. 15, 17, 25-26) that jurisdiction can be founded on CERCLA Section 113(h)(4), 42 U.S.C. 9613(h)(4), which provides an exception to the denial of jurisdiction contained in Section 113(h). Under Section 113(h), the prohibition against federal jurisdiction does not apply to:

> (4) An action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought

> with regard to a removal where a remedial action is to be undertaken at the site.

42 U.S.C. 9613(h)(4). By its plain terms, Subsection (4) provides jurisdiction only for CERCLA citizen suits "alleging that the removal or remedial action *taken* under section 9604 of this title or *secured* under section 9606 of this title *was* in violation of" CERCLA. *Ibid.* (emphasis added). As the court of appeals correctly ruled, the use of the past tense—allowing challenges alleging that an action *was* in violation of law—and the reference to removal or remedial action "taken" or "secured" reveal that Congress intended to allow challenges to removal or remedial actions only *after* those actions are completed. Pet. App. 9a-10a. To the extent the plain language may leave any doubt, the legislative history is, as the court of appeals also recognized (*id.* at 10a-13a), directly and specifically to the same effect.[4]

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[4] See, *e.g.*, H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 81 (1985) ("there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action[s] have been completed"); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 224 (1986) (judicial review postponed until "all the activities set forth in the Record of Decision for the surface clean up phase have been completed"); *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) (citing and quoting additional portions of the legislative history), cert. denied, 493 U.S. 991 (1989). Congress chose to delay review of EPA remedial actions until after completion so as to ensure that cleanup actions would not be delayed by lawsuits. See Pet. App. 15a ("Congress apparently concluded that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation."); *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 329 (9th Cir.) ("Congress has already

Every court of appeals that has interpreted this statutory provision has reached precisely the same conclusion. See *Schalk* v. *Reilly*, 900 F.2d 1091, 1095 (7th Cir.) ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."), cert. denied, 498 U.S. 981 (1990); *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) (the "plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed"), cert. denied, 493 U.S. 991 (1989); *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control and Ecology*, 999 F.2d 1212, 1216-1218 (8th Cir. 1993) (court lacks subject matter jurisdiction where remedial action has not been completed), cert. denied, 511 U.S. 1017 (1994); *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 328, 331 (9th Cir.) (the "unqualified language" of Section 113(h) "withholds federal jurisdiction to review citizen suits * * * that challenge ongoing CERCLA clean up actions"), cert. denied, 116 S. Ct. 51 (1995). Accordingly, no further review is warranted.

2. Petitioner asserts (Pet. 15-16) that Section 113(h) does not bar this action because it was brought,

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balanced all concerns" and concluded that "the need for swift execution of CERCLA cleanup plans" outweighs the risk of irreparable harm), cert. denied, 116 S. Ct. 51 (1995). Pre-remediation public participation, Congress determined, could be accommodated through non-judicial processes. Pet. App. 14a-15a ("Congress made the policy choice to substitute elaborate *pre-remediation* public review and comment procedures for judicial review," and also "gave the states, as representatives of the public, a significant role in the enforcement, in federal court, of the substantive standards established for remedial actions") (citations omitted).

at least in part, under RCRA rather than CERCLA. But the plain language of Section 113(h) precludes federal court jurisdiction "to review *any* challenges" to CERCLA remedial actions under *any* "Federal law," including the citizen suit provisions of RCRA. Pet. App. 20a-21a (emphasis added). Once again, the courts of appeals unanimously agree. See *Arkansas Peace Center*, 999 F.2d at 1217 (Section 113(h) bars federal jurisdiction over RCRA challenge to ongoing cleanup); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1020 (3d Cir. 1991) (Section 113(h) precludes review of National Historic Preservation Act of 1966 claim challenging ongoing cleanup); *McClellan*, 47 F.3d at 328-329 ("the unqualified language of [Section 113(h)] precludes 'any challenges' to CERCLA Section 104 clean-ups"—including RCRA and Clean Water Act challenges—"not just those brought under other provisions of CERCLA"); *Schalk*, 900 F.2d at 1095, 1097 (NEPA and Administrative Procedure Act claims barred).

3. Nonetheless, petitioner argues (Pet. 14-18) that the Third Circuit's interpretation of CERCLA Section 113(h) conflicts with the decisions in *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 510 U.S. 1092 (1994), and *Alabama* v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 493 U.S. 991 (1989). There is no conflict.

a. The question before the Tenth Circuit in *Colorado* was a narrow one: Whether a State could, notwithstanding Section 113(h)'s bar against "challenges" to ongoing EPA cleanup actions, enforce its EPA-authorized RCRA hazardous waste standards at a federal facility where a CERCLA cleanup was being conducted. 990 F.2d at 1568-1569. Answering that question in the affirmative, the Tenth Circuit held

that Section 113(h) did not preclude the State's enforcement of its hazardous waste program because the State's action did not constitute a "challenge" to EPA's remedial action within the meaning of Section 113(h). See *id.* at 1576 (action by State to enforce hazardous waste laws is "not necessarily a challenge to the CERCLA action"). In particular, the court emphasized, the suit did not seek to halt or delay EPA's remedial action. *Id.* at 1577 (distinguishing *Boarhead* on the ground that "the plaintiff's complaint in *Boarhead* sought to stay the CERCLA remedial action; thus, the plaintiff's action * * * clearly constituted a challenge to the CERCLA remedial action").

While the United States believes that the Tenth Circuit's decision in *Colorado* is incorrect, the holding in that case has not been adopted outside the Tenth Circuit and is not implicated by this case in any event.[5] It is undisputed that petitioner here *is* attempting to delay or block EPA from proceeding with its remediation plan. Even the Tenth Circuit has held that, where a plaintiff seeks to do so, Section 113(h)'s prohibition on federal jurisdiction unquestionably applies. See *United States* v. *City and County of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996) (finding *Colorado* "clearly distinguishable" and holding that the defendant's attempt to stay EPA's response action "constitutes a challenge" barred by Section 113(h)).[6] Because the courts of appeals

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[5] The United States unsuccessfully petitioned for certiorari in *Colorado* to address whether a State could dictate hazardous substance response activities at a CERCLA site through state law. See U.S. Pet. No. 93-786. That issue of federal-state relations is not raised by the present case.

[6] *Colorado* is distinguishable for yet another reason. There, the Tenth Circuit relied at least in part on 42 U.S.C. 9614(a),

universally agree that Section 113(h) deprives federal courts of jurisdiction over citizen suits that, like petitioner's, challenge ongoing CERCLA remedial actions, no further review is warranted.[7]

b. The asserted conflict with the Eleventh Circuit's decision in *Alabama* v. *EPA*, 871 F.2d 1548, similarly does not exist. In *Alabama*, the plaintiffs sought to enjoin EPA from shipping hazardous wastes from Texas to Alabama as part of the cleanup of a Texas Superfund site. *Id.* at 1553. The court of appeals held that "Section 113(h) clearly removes this challenge from federal jurisdiction" and the exception provided by "[S]ection 113(h)(4) applies only after a remedial action is actually completed." *Id.* at 1557. While the plaintiffs contended that their action did not "challenge" EPA's remedial action, the court disagreed, eventually adding that, "[t]o the extent

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which provides that nothing in CERCLA preempts "a State from imposing * * * additional liability or requirements with respect to the release of hazardous substances within such State." See 990 F.2d at 1576. Because the court believed that barring Colorado from enforcing its hazardous waste laws would prevent Colorado from "imposing" its hazardous waste "requirements" in contravention of 42 U.S.C. 9614(a), it read Section 113(h) as allowing Colorado's enforcement action to proceed. *Ibid.* Because this case does not involve a State's efforts to "impos[e] * * * additional liability or requirements," that rationale is inapplicable.

[7] As petitioner points out (Pet. 16), *Colorado* suggests that CERCLA Section 113(h) may not prohibit citizen suits under RCRA. The Tenth Circuit, however, explicitly stated that it "need not decide this issue." 990 F.2d at 1578. The existence of stray dictum in *Colorado*—dictum that is unlikely to be followed given the contrary case law in the other circuits—does not provide a sufficient justification for further review of this case.

plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction," the claims were without merit. *Id.* at 1559.

The Eleventh Circuit's decision in *Alabama* thus is entirely consistent with the Third Circuit's decision here. The court there, like the Third Circuit here, understood that it could not entertain challenges to the remedial action. Although petitioner claims (Pet. 17-18) that the Eleventh Circuit's brief mention of the merits shows that the Eleventh Circuit *must* have had jurisdiction, the Eleventh Circuit was careful to clarify that it would address plaintiff's claims on the merits only "[t]o the extent" they could "be read as not challenging the remedial action plan." 871 F.2d at 1560. Here, petitioner can claim no basis for reading its complaint as "not challenging" the remedial action plan. To the contrary, as petitioner's name suggests, the entire purpose of its lawsuit is to "arrest the incinerator remediation" that EPA intends to use.

4. Petitioner's claim (Pet. 9-14) that the lower courts had jurisdiction under this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), is similarly without merit. In *Leedom* v. *Kyne*, this Court held that the federal courts had the power to review a National Labor Relations Board (NLRB) decision that was "in excess of [the NLRB's] delegated powers and contrary to a specific statutory prohibition," 358 U.S. at 188, notwithstanding the fact that no federal statute expressly provided for a right of judicial review.

As the court of appeals held below (Pet. App. 25a), the narrow holding of *Leedom* v. *Kyne* does not permit judicial review where there is a clear statutory

provision divesting the courts of jurisdiction. As this Court explained in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), *Leedom* v. *Kyne* stands merely "for the familiar proposition" that courts should not "restrict access to judicial review" absent "clear and convincing evidence that Congress" intended for them to do so. *Id.* at 44. Where, as here, the language and history of a federal statute provides "clear and convincing evidence that Congress intended to deny" federal courts "jurisdiction to review and enjoin" ongoing agency action,[8] judicial review is unavailable. *Ibid.*; see also *Briscoe* v. *Bell*, 432 U.S. 404, 413-414 & n.13 (1977) (where statute "on its face forecloses judicial review," *Leedom* v. *Kyne* cannot be invoked to circumvent it).

Moreover, *Leedom* v. *Kyne* itself clearly limits review to cases in which an agency violates a "clear and mandatory" statutory restriction on its authority. 358 U.S. at 188.[9] Petitioner can cite no provision in the environmental laws that clearly prohibits EPA's selection and implementation of a soil incin-

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[8] See, *e.g.*, *Boarhead*, 923 F.2d at 1020 ("Congress could hardly have chosen clearer language to express its intent generally to deprive the district court[s] of jurisdiction."); *Schalk*, 900 F.2d at 1095 ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."); *Alabama*, 871 F.2d at 1557 ("The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed.").

[9] In *Leedom* v. *Kyne*, the statute barred the NLRB from approving a certain union structure "unless a majority of such professional employees vote for" it. 358 U.S. at 185; 29 U.S.C. 159(b)(1). The NLRB, notwithstanding that statutory requirement, attempted to approve the union structure without ever holding a vote. 358 U.S. at 185.

eration remedial action in this case. If the mere allegation that an agency's discretionary action violates the statute were sufficient to bring a challenge within the exception provided by *Leedom* v. *Kyne*, that "narrow" exception would swallow the rule. See *General Finance Corp.* v. *FTC*, 700 F.2d 366, 370 (7th Cir. 1983); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964).

5. Finally, petitioner contends (Pet. 19-24) that Section 113(h)'s preclusion of judicial review violates due process and a constitutional right of access to the courts.[10] That contention is without merit.

Under our judicial system, "[f]ederal courts are courts of limited jurisdiction," possessing authority to assert only the jurisdiction provided them by statute or by the Constitution. *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). While Congress created in CERCLA and RCRA statutory rights to sue the government under specified circumstances, it has—under the doctrine of sovereign immunity, among others—virtually unbridled discretion to withdraw them. See, *e.g.*, *Maricopa County* v. *Valley Nat'l Bank*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."); *Lynch* v. *United States*, 292 U.S. 571, 581 (1934) ("[C]onsent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn."). For

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[10] Petitioner also argues (Pet. 27) that Section 113(h)'s preclusion of judicial review deprives it of the equal protection of the laws. That argument was not raised below and thus is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

this reason, the lower federal courts unanimously agree that Section 113(h)'s limitation on the jurisdictional grant—a limitation that existed before petitioner brought its suit—is unquestionably constitutional. See Pet. App. 17a; *Schalk*, 900 F.2d at 1098; *Hanford Downwinders Coalition, Inc.* v. *Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995).[11]

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[11] The cases cited by petitioner (Pet. 19, 22-23) are not to the contrary. None involves the right to sue the United States, and all are distinguishable on other grounds as well. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), for example, held only that a State could not restrict access to state court divorce proceedings where the State itself had required use of "the judicial process" in the first place. *Id.* at 382-383. The Court was careful to explain that it was *not* holding that "access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause." *Id.* at 382. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), petitioner was given no notice of adoption proceedings regarding his child, causing him to lose his parental rights without due process of law. Petitioner does not claim a similar loss of rights or similar lack of notice here. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that it is arbitrary and therefore unconstitutional for a State to preclude access to administrative proceedings on the basis of its own procedural error. Here, Congress even-handedly eliminated judicial review for a good and non-arbitrary reason—to ensure that citizen suits would not unnecessarily delay urgent and necessary cleanup efforts. See note 4, *supra*. *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), and *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), both involve the propriety of activities conducted by employers in retaliation for the employees' union activities protected under the federal labor laws; they have no application here. Finally, *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933), to the extent that it is relevant at all, stands for the proposition that a plaintiff has no constitutionally protected right "in any particular form of remedy." It thus does not support but rather undermines petitioner's position.

Besides, CERCLA does provide petitioner with opportunities to be heard. Although Congress placed limitations on judicial review of EPA's response actions in Section 113(h)—and deprived federal courts of jurisdiction over CERCLA citizen suit challenges to ongoing EPA remedial efforts—it also established extensive administrative opportunities for public comment, and requirements for EPA to respond to that comment. See 42 U.S.C. 9613(k), 9617; see also 40 C.F.R. 300.430(c) and (f)(3). Moreover, it is undisputed that, under Section 113(h)(4), petitioner will be free to bring a CERCLA citizen suit once EPA has completed its remedial action. No case cited by petitioner entitles it to anything more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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